ACTION

OCA 87-5990

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	ACTION	INFO
1. D/OCA		X
2. DD/Legislation	X	
3. DD/Senate Affairs		X
4. Ch/Senate Affairs		
5. DD/House Affairs		X
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7. Admin Officer		
8. Executive Officer		
9. FOIA Officer		
10. Constituent Inquiries Officer		
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SUSPENSE 12/10/87
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EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

SPECIAL

December 9, 1987

LEGISLATIVE REFERRAL MEMORANDUM OCA FILE leg

TO: **Legislative Liaison Officer -**

Central Intelligence Agency
Department of State (Howdershell 647-4463) 25
Department of Defense (Brick 697-1305) 06
National Security Council (Allison Fortier)

SUBJECT: Justice's draft testimony on S. 1721, congressional oversight of intelligence activities.

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

A response to this request for your views is needed no later than 3:00 P.M., THURSDAY, DECEMBER 10, 1987.

Questions should be referred to SUE THAU/ANNETTE ROONEY (395-7300), the legislative analyst in this office or to Russ Neely (395-4800).

Ronald K. Peterson
RONALD K. PETERSON FOR
Assistant Director for
Legislative Reference

Enclosures

cc: M. Margeson
A.B. Culvahouse, Jr.
M. Reed
B. Howard

SPECIAL

Mr. Chairman, Members of the Committee:

I am pleased to appear before you today to discuss the constitutional issues implicated by S. 1721, a bill relating to the system of congressional oversight of intelligence activities. The Department of Justice believes that this legislation, in its present form, would unconstitutionally intrude upon the President's authority to conduct the foreign relations of the United States. In my statement, I will discuss briefly the Administration's constitutional concerns with S. 1721. It will be left to others in the Administration to address concerns of a nonconstitutional nature.

S. 1721, of course, would repeal the Hughes-Ryan Amendment, which requires Presidential approval of covert actions by the CIA. In its place, the bill would institute a new presidential approval requirement, which would become Section 503 of the National Security Act of 1947. Proposed Section 503 would require that the President authorize all "special activities," or covert actions, conducted by any department, agency, or entity of the United States government. The Presidential approval would take the form of a "finding," which must be reduced to writing within forty-eight hours of the time that a decision regarding covert actions is made.

Proposed Section 503 would be broader than the Hughes-Ryan Amendment in that it would apply not just to covert actions conducted by the CIA, but also to covert actions conducted by other agencies or entities of the United States. This change does not in and of itself raise a serious constitutional problem.

To the extent that Congress constitutionally may impose requirements of Presidential approval and notification to Congress on covert actions conducted by the CIA, it also may impose such requirements on covert actions conducted by other agencies and entities. The Department of Justice believes, however, that the requirement of notification to Congress set forth in S. 1721 is unconstitutional. Increasing the scope of the requirement therefore exacerbates the constitutional problem.

S. 1721 would do much more than extend the Presidential approval requirement to agencies other than the CIA. It also would require that the findings be in writing. In circumstances where time does not permit the preparation of a written finding prior to Presidential approval, S. 1721 would require that a written finding be prepared "as soon as possible." In no event would S. 1721 permit the preparation of a written finding more than forty-eight hours after a Presidential decision had been made. As you may know, this proposed change is redundant inasmuch as the President already has recognized the general need to commit findings to writing, and has adopted procedures virtually identical to those set forth in the bill in order to ensure that findings are put into written form as soon as possible. Indeed, in a letter to Chairman Boren dated August 7, 1987, the President pledged that "[e]xcept in cases of extreme emergency," all national security findings will be in writing. Moreover, the President stated that if an oral directive is necessary, a finding will be "reduced to writing and signed by the President as soon as possible, but in no event more than two working days thereafter."

The primary constitutional problem with S. 1721, however, arises not from the requirement that a finding be in writing, but instead from the requirement that a finding, under all circumstances, be reported to the congressional intelligence committees within a fixed period of time after it is signed. The current statutory scheme recognizes that there may be some circumstances in which Congress is not given prior notice of a finding. In such situations, the President is required only to inform the intelligence committees in "a timely fashion" of the covert action. The proposed amendment to the National Security Act of 1947 would require that notice in all cases be given within 48 hours of the time that a finding is signed, and thus would eliminate the flexibility provided under the current Act.

There are two other provisions of S. 1721 which raise similar constitutional problems. Proposed Section 502 would require that intelligence agencies disclose to Congress whatever information concerning intelligence activities, other than "special activities," that Congress deems necessary to fulfill its responsibilities. Proposed Section 502 contains only one exception to its absolute disclosure requirement; the Executive branch is granted authority to protect classified information relating to sensitive intelligence sources and methods. Proposed Section 503 has a similar provision requiring the Executive branch to disclose all information concerning covert actions that is requested by the intelligence committees. Proposed Section 503, however, is not even tempered by the limited exception permitting the Executive branch to protect sensitive sources and methods. These

virtually absolute disclosure requirements and the 48-hour notice provision raise much the same concern. Both purport to eliminate completely the authority of the Executive branch to withhold from Congress information relating to the conduct of foreign affairs, even when the release of such information would interfere with the President's ability to fulfill his constitutional duties.

This Administration, like prior Administrations, is anxious to work with Congress in devising arrangements to satisfy the Congress' legitimate interests in legislative oversight. For that reason, President Reagan has provided prior notice of covert operations in virtually every case. This Administration also has provided to the intelligence committees almost all information that has been requested. Moreover, the President recently has reaffirmed his commitment to the current statutory scheme of prior notification and has made clear his desire and intention to cooperate with Congress in the area of foreign affairs. Despite this pledge from the President, however, the Department believes that there is a point beyond which the Constitution will not permit congressional encumbrances on the President's ability to initiate, direct, and control the sensitive national security activities at issue here. S. 1721 goes beyond this point, in our view, both by purporting to oblige the President, under any and all circumstances, to notify Congress of a covert action within a fixed period of time and by requiring the Executive branch to disclose all information requested by the intelligence committees.

In this testimony, I will not attempt to discuss all of the authorities and precedents relevant to our conclusion that these provisions of S. 1721 are unconstitutional. Nevertheless, I do believe that it is important to discuss briefly some of the sources that support our conclusion. First, of course, there is the text of the Constitution itself. Article II, section 1 of the Constitution provides that "[t]he executive Power shall be vested in a President of the United States of America." This clause has long been understood to confer on the President a plenary authority to represent the United States and to pursue its interests outside the borders of the country, subject of course to the limits set forth in the Constitution itself and to such statutory limitations as the Constitution permits Congress to impose by exercising one of its enumerated powers.

Alexander Hamilton, in The Federalist, recognized that the Constitution vests in the President the power to conduct foreign relations. He said that "[t]he essence of the legislative authority is to enact laws, or in other words to prescribe rules for the regulation of society." By contrast, the executive magistrate, Hamilton argued, is concerned instead with the "execution of the laws and the employment of the common strength . . . for the common defense." This fundamental distinction between "prescribing rules for the regulation of the society" and "employing the common strength for the common defense" is important, for it reflects the Framers' intention to give Congress only those powers in the area of foreign affairs that directly involve the exercise of legal authority over American citizens.

As to other matters in which the nation acts as a sovereign entity in relation to outsiders, the Constitution delegates the necessary authority to the President in the form of "executive Power."

The authority of the President to conduct foreign affairs was first asserted by George Washington and acknowledged by the First Congress. President Washington, without consulting Congress, issued the famous Proclamation of Neutrality, which provided that the United States would be neutral in the war between France and Great Britain. Alexander Hamilton, writing under the pseudonym "Pacificus," again argued persuasively that the direction of foreign policy is an inherently "executive" function. It is clear, moreover, that Washington and his successors recognized that this power carries with it the authority to withhold information from Congress when that information relates to the conduct undertaken pursuant to President's prerogative in foreign affairs.

In 1792, the House of Representatives called upon the Executive branch to produce "persons, papers and records" relating to a military campaign that General St. Clair had led against Indians in the Northwest. President Washington summoned his Cabinet to discuss the congressional request because he believed that insofar as it might "become a precedent, it should be rightly conducted." The President pointed out that "there might be papers of so secret a nature, as they ought not to be given up." After considering the matter for a couple of days, the Cabinet reached the same conclusion. Its report to the President stated

that the Executive branch should "communicate such papers as the public good would permit," but that it should "refuse those, the disclosure of which would injure the public." The Cabinet report went on to state, however, that "there was not a paper which might not be properly produced," and President Washington therefore decided to give the House the papers that it wanted.

Over 50 years later, the House of Representatives asked for an accounting of $5460 that had been expended by the Tyler Administration in negotiating a treaty with Great Britain. President Polk responded that "the experience of every nation on earth has demonstrated that emergencies may arise in which it becomes absolutely necessary for the public safety or the public good to make expenditures the very object of which would be defeated by publicity." According to President Polk, his predecessor, President Tyler, had "solemnly determined" that the circumstances surrounding the expenditure of these funds should remain a secret. Therefore, President Polk refused to "revise the acts of his predecessor."

There have been many other situations in which a President has refused to accede to a Congressional request for information that he deems confidential. These range from President Hoover's refusal to provide the Senate Foreign Relations Committee with letters concerning negotiation of the London Treaty to President Eisenhower's refusal to turn over personnel information during Congressional investigations into the loyalty-security program. Moreover, on numerous occasions in our history, Congress itself has recognized that its power to get information from the

Executive branch is not absolute, particularly when it relates to a matter within the ambit of the President's foreign affairs powers.

James Madison, while a member of the House of Representatives, defended Washington's decision to withhold from the House information relating to the negotiation of the Jay Treaty. Madison asserted that "the Executive had a right . . . to withhold information, when . . . [he] conceived that, in relation to his own department, papers could not be safely communicated." Indeed, historically most congressional requests for Executive branch information have been qualified to exclude information that the President deems it inappropriate to disclose. Thus, for example, when calling upon President Jefferson to provide information relating to the Burr conspiracy, the House requested all such information "except such as [the President] may deem the public welfare to require not to be disclosed."

Congressional recognition of the President's right to withhold information has continued into the twentieth century. Senator O'Mahoney of Wyoming, who was one of the foremost proponents of congressional access to Executive branch information, did nothing more than state the traditional understanding when he remarked "[i]t is generally agreed that the President has the constitutional right, in matters of foreign relations, to decline to give out information when he believes that such information would impair national security." Senator Humphrey made the same point when he told the Senate that "there is no bill we can write whereby we can compel the president of the United States to

deliver information, if he feels such is contrary to his duty under the Constitution of the United States."

The federal judiciary has likewise recognized the President's important powers in the area of foreign affairs. In Curtiss-Wright, the Supreme Court drew a sharp distinction between the President's relatively limited inherent constitutional powers to act in the domestic sphere and his far-reaching discretion to act on his own constitutional authority in managing the external relations of the country. The Court emphatically declared that this discretion derives from the Constitution itself, stating that "the President [is] the sole organ of the federal government in the field of international relations -- a power which does not require as a basis for its exercise an act of Congress." Curtiss-Wright thus confirms the President's inherent Article II authority to engage in a wide range of extraterritorial foreign policy initiatives, including intelligence activities -- an authority that derives from the Constitution, not from the passage of specific authorizing legislation.

More recently, the Supreme Court again has emphasized that the President has broad powers in the area of foreign affairs. Moreover, the Court's reasoning indicates that this power will sometimes justify withholding information from the other branches of the government. In United States v. Nixon, the Court invoked the basic Curtiss-Wright distinction between the domestic and international contexts to explain its rejection of former President Nixon's claim of an absolute privilege to maintain the confidentiality of Executive branch communications. While

rejecting his sweeping and undifferentiated claim of executive privilege as it applied to communications involving domestic affairs, the Court repeatedly stressed that military or diplomatic secrets are in a different category. The Court's opinion stated that the protection of such secrets is inextricably linked to the President's Article II duties, where the "courts have traditionally shown the utmost deference to Presidential responsibilities." Covert intelligence operations in foreign countries are among the most sensitive and vital aspects of the President's constitutional responsibilities in the field of foreign relations. It is clear that such activities are within the so-called "state secrets" doctrine recognized in U.S. v. Nixon.

Despite this wide-ranging authority, Presidents have been careful to consult regularly with Congress to seek support and counsel in matters of foreign affairs. Moreover, we recognize that the President's authority over foreign policy, precisely because its nature requires that it be wide and relatively unconfined by preexisting constraints, is inevitably somewhat ill-defined at the margins. Whatever questions may arise at the outer reaches of his power, however, the conduct of secret negotiations and intelligence operations lies at the very heart of the President's executive power.

Our view that the Constitution does not authorize these provisions of S. 1721 should not be misinterpreted as a denial that Congress has a legitimate role in the formulation of American foreign policy. Rather, our point is merely that Congress is

a legislative and not an administrative body. Congress' implied authority to oversee the activities of executive branch agencies is grounded on its need for information to consider and enact needful and appropriate legislation. Congress in the performance of this legislative function does not require notification of virtually all intelligence activities within a fixed period after the time that the President signs an order authorizing its initiation.

It has been suggested that this legislation may be justified on the basis of Congress' power to tax and spend, the appropriations power. The argument is that the power to appropriate or to refuse to appropriate funds includes the lesser power to appropriate funds subject to a condition, such as the reporting requirement of S. 1721. We readily acknowledge that Congress' appropriations power is exceedingly broad, and includes as a general matter the authority to attach conditions to appropriations. But it is not limitless. The fact is that Congress appropriates every penny that is spent by every agency of the Federal Government (other than borrowing authorized by Congress). It also appropriates all salaries for all federal employees in all three branches of government. But the fact that Congress appropriates money for the Army does not mean that it can constitutionally condition an appropriation on allowing its armed services committees to have tactical control of the armed forces. Nor does it follow from Congress' establishment through legislation of the various executive branch departments and its appropriation of money to pay the salaries for federal officials that

Congress can constitutionally condition the creation of a department or the funding of an officer's salary on being allowed to appoint the officer. Acceptance of this understanding of the appropriations power would in effect transfer to Congress all powers of all branches of government. The framers' carefully worked out scheme of separation of powers, of checks and balances, would be rendered meaningless. Accordingly, however broad the Congress' appropriations power may be, the power may not be exercised in ways that violate constitutional restrictions on its own authority or that invade the constitutional prerogatives of the other branches.

Even in cases in which it can be assumed that Congress has a legitimate legislative basis for the requested information, it does not follow that the President invariably should communicate findings to Congress within 48 hours of the time that they are signed. As President Tyler recognized in 1843, "[i]t cannot be that the only test is whether the information relates to a legitimate subject of [congressional] deliberation." A President is not free to communicate information to Congress if to do so would impair his ability to execute his own constitutional duties. Under some circumstances, communicating findings to Congress within 48 hours could well frustrate the President's ability to conduct foreign affairs. For example, it was absolutely necessary that the Carter Administration withhold from Congress information relating to Canada's involvement in the smuggling of six American hostages out of Iran. According to Admiral Stansfield Turner, who was Director of the CIA at the time, Canada made

withholding notification to Congress a condition of its participation. Similarly, requiring the Executive branch to disclose all information requested by the intelligence committees could, under some circumstances, prevent the President from fulfilling his constitutional duties.

In this regard, it might be useful to recall the debates in the Senate on the Mutual Security Act of 1957. Senator O'Mahoney of Wyoming, whom I quoted earlier, proposed an amendment to the act that would require the Secretary of State to keep the foreign relations and appropriations committees of both the House and the Senate "fully and currently informed with respect to all activities of the Department of State or any agency thereof . . . ." The amendment was attacked as both an unconstitutional infringement of the President's executive power and as an ill-advised attempt by Congress to administer the foreign policy of the United States. Senator J. William Fulbright charged that the purpose of the bill was "to assume the responsibility which is in the executive." Senator Humphrey joined Senator Fulbright in opposing the amendment, noting that "day to day type of reporting . . . would impair the administration of foreign policy." The Senate, no doubt with the remarks of Senators Fulbright and Humphrey in mind, defeated the O'Mahoney Amendment.

The provisions of S. 1721 requiring that the President provide all information requested by the intelligence committees raises a separate constitutional problem, which I should discuss briefly. Many of the documents retained by the intelligence agencies, although not "state secrets," may constitute inter-

agency communications. Although disclosure of these documents might not impair directly the President's authority in the area of foreign affairs, we nevertheless believe that the Executive branch may legitimately refuse to provide these documents to Congress. The Supreme Court in the Nixon case recognized that there is a "valid need for protection of communications between high government officials and those who advise and assist them." While this decision was rendered in the context of Presidential communications, the same principles would apply with respect to communications containing the policy deliberations of other executive officials. The need to protect deliberative communications derives from the need for candor and objectivity in the policymaking decisions of the government. This need exists not only at the Presidential level, but also at other levels in the government.

Of course, the Executive branch will attempt to cooperate with Congress in fulfillment of its legitimate responsibilities. In all but the most exigent circumstances, this cooperation will take the form of providing information that Congress requests. We cannot agree, however, that a blanket requirement of disclosure in all cases is appropriate. The President must retain the discretion to withhold such information when its disclosure would impair his ability to fulfill his own constitutional responsibilities.

In sum, then, S. 1721 raises a number of constitutional concerns. First, the requirement that the President, under all circumstances, report to Congress within 48 hours of the time

that a finding is signed authorizing covert action unconstitutionally interferes with the President's foreign affairs powers. Likewise, the absolute requirement that the Executive branch provide all information requested by the intelligence committees may impede the President's ability to discharge his constitutional responsibilities in the area of foreign affairs. Moreover, the disclosure provisions purport to prevent the President from protecting confidential executive branch deliberations. These provisions attempt by legislation to alter the Constitution's allocation of powers among the institutions of our government. This simply cannot be done by legislation, regardless of whether the Executive branch concurs in the reallocation of power.

I thank the Committee for this opportunity to discuss our constitutional concerns and would be pleased to address any questions that you may have.